Supreme Court, U.S.
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No. 95-1847

In The

Supreme Court of the United States

October Term, 1995

THE SANTA CRUZ OPERATION, INC., a California corporation, LARS H. TURNDAL, DAN E. STEIMLE, DOUGLAS L. MICHELS, and LAWRENCE MICHELS,

Petitioners,

v.

DR. STEPHEN MOSKOWITZ, LENORA ISAACS, JERRY KATZ, IRA ROLLOVER, and DAVID ACKERMAN, on behalf of themselves and all others similarly situated,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeal Of California Sixth Appellate District

BRIEF OF THE AMERICAN ELECTRONICS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do Sections 11 and 12(2) of the Securities Act of 1933 require a corporation to disclose an executive's ill health in a prospectus or registration statement, where Securities and Exchange Commission regulations do not require disclosure, where the company made no affirmative statements regarding the executive's health or continued service, and where collecting and disclosing information regarding health would invade the executive's privacy and violate the Americans with Disabilities Act?

CONSENT OF ALL PARTIES

Pursuant to Rule 37.2 of the Rules of this Court, all parties consent to the filing of this Brief of *Amicus Curiae* in Support of the Petition for Writ of Certiorari.

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is presented by the American Electronics Association ("AEA") in support of the petition of The Santa Cruz Operation Inc. ("SCO"), Lars H. Turndal, Dan E. Steimle, Douglas L. Michels, and Lawrence Michels, for a writ of certiorari. AEA's membership includes over 3000 technology companies worldwide and spans the breadth of the electronics industry, including the semiconductor, software, computer, telecommunications, networks and systems fields. AEA members are frequently named as defendants in securities class action lawsuits; accordingly, the AEA has an interest in the development of the securities laws as they apply to securities class actions.

This case is of exceptional importance to the member companies of the AEA. Every public company member of the AEA is subject to compliance with federal securities laws and regulations governing disclosure in prospectuses and registration statements; thus it is crucial that the AEA's members know whether they are now obligated to disclose to the public an executive's health problems. Moreover, the decision of the California Court of Appeal will likely give rise to a substantial volume of litigation on the issue of whether Sections 11 or 12(2) were violated any time an executive is incapacitated or resigns shortly after the company filed a prospectus and registration statement with the Securities and Exchange Commission ("SEC").

REASONS FOR GRANTING THE WRIT

On February 14, 1996, the California Court of Appeal for the Sixth Appellate District held that a plaintiff class of investors could sue computer software company The Santa Cruz Operation, Inc. under Sections 11 and 12(2) of the Securities Act of 1933 on the grounds that SCO's registration statement and prospectus created the false impression that James Harris, one of SCO's outside directors, was in good health. The court of appeal did not find the fact that every one of SCO's statements about Mr. Harris had been required by governing SEC disclosure regulations to be relevant to the court's analysis. Nor was the court of appeal persuaded that requiring SCO to disclose the state of Mr. Harris's health would violate Mr. Harris's privacy rights or conflict with the Americans with Disabilities Act.

The Petition for a Writ of Certiorari should be granted for two reasons. First, the court of appeal's decision creates a new disclosure obligation that will be virtually impossible for companies to fulfill. Because the statements SCO made about Mr. Harris (for example, his age, work experience, compensation, and committee membership) are required to be made in every registration statement and prospectus, the court of appeal's reasoning applies to every registration statement and prospectus filed by any company. Thus, the practical effect of the court of appeal's decision is that companies must now investigate and disclose the health of every executive mentioned in a registration statement or

prospectus.[1] This disclosure issue will arise every time a public offering prospectus is filed, regardless of whether the company made any affirmative statements about health. This burdensome disclosure obligation will be further complicated by the fact that "ill health" is subjective: how are companies ever to be sure that their investigations and disclosures, are adequate?[2] Furthermore, there is very little to prevent plaintiffs from claiming that illnesses that arise after an offering should have been detected and disclosed in a prospectus or registration statement.

Second, by requiring a company to investigate and disclose the health of its executives, the court of appeal's decision forces companies to invade the privacy of their executives, and to violate the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12101 *et seq.* Under the ADA, a company may not require a medical examination, or even unofficially inquire into an employee's health or disability, unless the examination or inquiry is "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). Neither the ADA, nor the EEOC

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[1] Indeed, because the relevant language of Rules 10b-5 and 14a-9 is virtually identical to the text of Sections 11 and 12(2), the issue of whether to disclose an executive's health problems arguably arises with every public statement a company makes about one of its officers or directors.

[2] Moreover, if a company does investigate and disclose a health problem of one of its executives, the corporation may have a duty to update investors with any material change so that the original disclosure statement does not become a misrepresentation of the executive's condition. Given the fact that many illnesses are inherently unpredictable, such disclosure obligations are particularly burdensome.

regulations implementing the ADA, offer any clear guidance on when an inquiry is job-related and consistent with business necessity. Moreover, even if the ADA's "business necessity" exception allowed a company to inquire into an executive's health during a prospectus's preparation, the Act is clear that any information obtained would have to be kept strictly confidential. 42 U.S.C. § 12112(d)(4)(C).

Thus, if the court of appeal's decision is allowed to stand, every company that issues equity will be faced with an extremely difficult decision: violate the ADA by investigating and disclosing the health of each person mentioned in a prospectus, or risk a securities class action lawsuit should an executive become ill or die soon after the offering. The Court should settle this important conflict.

In sum, the court of appeal's decision creates a burdensome and invasive disclosure obligation that not only will be virtually impossible for companies to fulfill, but also implicates serious privacy concerns and conflicts with the express language of the Americans with Disabilities Act. The AEA therefore respectfully requests that the Court grant the Petition for a Writ of Certiorari and review the decision of the Court of Appeal.

CONCLUSION

For the foregoing reasons, *amicus curiae* requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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